

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,

Plaintiff,

v.

SARAH A. GAST,

Defendant.

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Case No.: 1004011626

Eric Zubrow, Deputy Attorney General
Department of Justice
820 N. French Street, 7th floor
Wilmington, DE 19701

Joseph Hurley, Esquire
1215 King Street
Wilmington DE 19801

Date Submitted: August 8, 2011

Date Decided: August 23, 2011

MEMORANDUM OPINION

Dear Counsel:

Trial in the above captioned matter took place on Monday, August 8, 2011 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of documentary evidence and sworn testimony the Court reserved decision. This is the Court's Final Decision and Order.

The defendant, Sarah A. Gast ("Gast") was charged by Information filed with the Clerk of the Court by the Attorney General with "Driving a Vehicle Under the Influence of Alcohol in Violation of Title 21, Section 4177(a)(1) of the Delaware Code of 1974" in that "...on or about the 16th day of April, 2010 in the County of New Castle, State of Delaware, [the defendant] did drive a vehicle upon 32 Fox Hunt

drive, Bear, DE while allegedly under the influence of alcohol or drug or a combination thereof...”.

Second, defendant was charged by Information filed with the Clerk of the Court by the Attorney General with “Parking in a Handicapped Space in violation of Title 21, Section 4183 of the Delaware Code of 1974, as amended” in that “on or about the 16th day of April, 2010, in the County of New Castle, State of Delaware, did park a vehicle, other than a vehicle of the handicapped, at 32 Fox Hunt Drive, Bear, DE in an area which was designated as a handicapped parking zone and which was conspicuously marked as such.”

The Facts

At trial State Trooper Lawrence Walther (“Trooper Walther”) was sworn and testified. Trooper Walther has been with the Delaware State Police for seven (7) years and at the time of the incident was assigned to Troop 2 in New Castle County. Trooper Walther duties include uniform traffic control stops for summonses and criminal violations as well as investigations for DUI on public routes.

On April 16, 2010 Trooper Walter was working the night shift and responded to a call after midnight at approximately 1:00 AM through 9-1-1, a dispatcher call. He thereafter traveled to Thurston’s Bar at Fox Run Shopping Center in New Castle County regarding a complaint for “a suspicious vehicle parked outside in the handicapped spot” near that establishment. Trooper Walther located a tan Honda

Accord in the handicapped spot. He observed a female juvenile in the back seat of the Honda Accord.

When Trooper Walter arrived he saw the defendant's vehicle without a handicap license plate parked in the handicap spot. He made contact with the defendant inside her motor vehicle. At that moment, the rear brakes were on and the defendant was backing up in her Honda Accord. He identified the defendant as Sarah A. Gast in the courtroom.

Gast rolled down her window and spoke to the officer. Trooper Walther detected a strong 'odor of alcoholic beverage', her 'speech was slurred', her eyes 'bloodshot', and she was 'slouched in the seat behind the driver's wheel'. According to Trooper Walther, defendant appeared 'dazed' and 'confused'. Trooper Walther engaged the defendant in a verbal conversation. He observed a child in the backseat as well as a male passenger in the right seat. Gast told the officer that they went out for a "few drinks" at Thurston's Bar and were presently camping at Lum's Pond.

Gast was asked to exit her motor vehicle. Gast was requested to perform some Mental Acuity Tests; namely the Alphabet and Counting Test. Gast was requested to state the letters E-P, which she did successfully and state the numbers 98-83, which she also stated correctly.

Prior to trial defendant's counsel, Mr. Hurley stipulated to Trooper Walther's qualifications as an expert to administer the Horizontal Gaze Nystagnus Test as well as Intoxilizer Training of the Intoxilizer 5000. Trooper Walther testified he properly

administered the HGN test according to the NHTSA Guidelines. According to Trooper Walther, defendant exhibited all six clues, which he testified under NHTSA Guidelines indicated a 77% probability that Gast's BAC was greater than .10.

The Court next heard oral argument on Mr. Hurley's Motion to Exclude and/or *In Limine* the remaining NHTSA tests administered by Trooper Walther. Mr. Hurley's legal argument was that when Gast was asked by Trooper Walther if she had any physical disabilities, she told Trooper Walther she had "bad knees" as a result of gymnastics in high school. Mr. Hurley's Motion was based upon *State v. Ministero*¹ wherein the Superior Court ruled that when a Police Officer is informed of a disability any resultant Field Coordination Test under NHTSA Guidelines are not reliable.² under the NHTSA guidelines.³

The defendant was then taken by Trooper Walther to Troop 2 for the administration of an Intoxilizer 5000 Test, which the State, for the reasons set forth in the record, did not formally move into evidence. Defendant was thereafter issued a Summons by Trooper Walther for DUI, 21 *Del.C.* §4177(a), as well as Parking in a Handicapped spot, 21 *Del.C.* §4183, and was subsequently released to her father's custody.

¹ *State v. Ministero*, 2006 WL 3844201 (Del. Super.)

² Mr. Hurley presented several additional Superior Court cases on print and the Court granted defendant's Motion to Exclude both the Walk and Turn Test and One Legged Stand Test.

³ *State v. Ministero*, 2006 WL 3844201 (Del. Super.)

On cross-examination, Trooper Walther testified he pulled into the parking lot of Thurstan's Bar within five (5) minutes of the 9-1-1 call. The defendant's lights were on and defendant "stopped properly". Trooper Walther walked up to the driver's side door and the defendant rolled down the window. Trooper Walther conceded in his report the word "confused" were not noted in the narrative in or the AIIR report. Trooper Walther also testified that he is not familiar with the defendant's normal facial expressions or whether the defendant is subdued or whether her speech is different than a normal person "outside a DUI". Trooper Walther conceded that the defendant was "coherent"; "understood his questions;" and answered his questions "properly". The defendant also produced her driver's license; registration card; and insurance card properly, Trooper Walther testified he could not recall from where inside her motor vehicle Gast retrieved those motor vehicle documents. Trooper Walther also conceded his eyes were "moving all in or about the car" so he was not always focused on the defendant. Trooper Walther said there was "no erratic behavior" on behalf of Gast when producing the documents. The defendant told him at some point during his investigation at the Troop or otherwise, "I'm fine", "I can drive" and "I'm not drunk".

On cross-examination, Trooper Walther also testified that when the defendant exited the motor vehicle to perform the Field Coordination Tests that Gast did not have "any balance difficulties;" "nor was she unsteady" when performing the HGN test. Trooper Walther also watched the defendant walk thirty (30) feet without

difficulty to a safe location in order to administer the HGN tests. The defendant performed the Alphabet and Counting Test normally and successfully. Trooper Walther testified while that the defendant's speech was "slurred", he was not aware of Gast's normal speech patterns.

The State rested its case-in-chief.

Dr. Michael Gast ("Dr. Gast") testified on behalf of the defendant. Dr. Gast has a PhD in Microbiology and has been a doctor for approximately twenty-five years. Dr. Gast teaches molecular biology. Dr. Gast is the defendant's father. For the last fifteen years he has been in the pharmaceutical industry and previously worked at Christiana Hospital. Dr. Gast testified his daughter is thirty (30) years of age. He recalls April 16, 2010 because he received a telephone call from his daughter at approximately 1:00 AM. He traveled to Troop 2 and picked up his daughter.

Dr. Gast testified his daughter's speech was "clear" and that he did not observe "any smell of alcohol". He testified his daughter was "understandably upset", "afraid" and a "little intimidated", but that he observed "no slurred speech" or "mumbled speech".

On cross-examination, Dr. Gast testified that his daughter called at approximately 1:00 AM and they spoke for approximately 10-15 minutes. Dr. Gast picked his daughter up at Troop 2 and his daughter told him "I'm not intoxicated". His daughter told him she was previously at a local shopping center "after a few drinks" while she was camping at Lum's Pond. His daughter also told Dr. Gast that

she had a “drink or two” at the local bar establishment, she was then was taken to Troop 2 by the Officer and needed a ride home. Dr. Gast testified that he did not “smell any alcohol” and that he also looked at his daughter’s eyes which “did not appear red or bloodshot”.

The Law

Sec. 4177. Driving a vehicle while under the influence or with a prohibited alcohol content; evidence; arrests; and penalties

(a) No person shall drive a vehicle:

- (1) When the person is under the influence of alcohol;
- (2) When the person is under the influence of any drug;
- (3) When the person is under the influence of a combination of alcohol and any drug;
- (4) When the person's alcohol concentration is .08 or more; or
- (5) When the person's alcohol concentration is, within 4 hours after the time of driving .08 or more. Notwithstanding any other provision of the law to the contrary, a person is guilty under this subsection, without regard to the person's alcohol concentration at the time of driving, if the person's alcohol concentration is, within 4 hours after the time of driving .08 or more and that alcohol concentration is the result of an amount of alcohol present in, or consumed by the person when that person was driving.

(b) In a prosecution for a violation of subsection (a) of this section:

- (1) Except as provided in paragraph (b)(3)b. of this section, the fact that any person charged with violating this section is, or has been, legally

entitled to use alcohol or a drug shall not constitute a defense.

- (2) a. No person shall be guilty under subsection (a)(5) of this section when the person has not consumed alcohol prior to or during driving but has only consumed alcohol after the person has ceased driving and only such consumption after driving caused the person to have an alcohol concentration of .08 or more within 4 hours after the time of driving.
- b. No person shall be guilty under subsection (a)(5) of this section when the person's alcohol concentration was .08 or more at the time of testing only as a result of the consumption of a sufficient quantity of alcohol that occurred after the person ceased driving and before any sampling which raised the person's alcohol concentration to .08 or more within 4 hours after the time of driving.
- (3) The charging document may allege a violation of subsection (a) without specifying any particular subparagraph of subsection (a) and the prosecution may seek conviction under any of the subparagraphs of subsection (a).
- (c) For purposes of subchapter III of Chapter 27 of this title, this section and §4177B of this title, the following definitions shall apply:
 - (1) "Alcohol concentration of .08 or more" shall mean:
 - a. An amount of alcohol in a sample of a person's blood equivalent to .08 or more grams of alcohol per hundred milliliters of blood; or
 - b. An amount of alcohol in a sample of a person's breath equivalent to .08 or more grams per two hundred ten liters of breath.
 - (2) "Chemical test" or "test" shall include any form or method of analysis of a person's blood, breath or urine for the purposes of determining alcohol

concentration or the presence of drugs which is approved for use by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner, the Delaware State Police Crime Laboratory, any state or federal law enforcement agency, or any hospital or medical laboratory. It shall not, however, include a preliminary screening test of breath performed in order to estimate the alcohol concentration of a person at the scene of a stop or other initial encounter between an officer and the person.

- (3) "Drive" shall include driving, operating, or having actual physical control of a vehicle.
- (4) "Vehicle" shall include any vehicle as defined in §101(80) of this title, any off-highway vehicle as defined in §101(39) of this title and any moped as defined in §101(31) of this title.
- (5) "While under the influence" shall mean that the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle.
- (6) "Alcohol concentration of .16 or more" shall mean:
 - a. An amount of alcohol in a sample of a person's blood equivalent to .16 or more grams of alcohol per hundred milliliters of blood; or
 - b. An amount of alcohol in a sample of a person's breath equivalent to 20 or more grams per two hundred ten liters of breath.
- (7) "Drug" shall include any substance or preparation defined as such by Title 11 or Title 16 or which has been placed in the schedules of controlled substances pursuant to Chapter 47 of Title 16. "Drug" shall also include any substance or preparation having the property of releasing

vapors or fumes which may be used for the purpose of producing a condition of intoxication, inebriation, exhilaration, stupefaction or lethargy or for the purpose of dulling the brain or nervous system.

(d) Whoever is convicted of a violation of subsection (a) of this section shall:

(1) For the first offense, be fined not less than \$230 nor more than \$1,150 or imprisoned not more than 6 months or both, and shall be required to complete an alcohol evaluation and a course of instruction and/or rehabilitation program pursuant to § 4177D of this title, which may include confinement for a period not to exceed 6 months, and pay a fee not to exceed the maximum fine. Any period of imprisonment imposed under this paragraph may be suspended.

(2) For a second offense, be fined not less than \$575 nor more than \$2,300 and imprisoned not less than 60 days nor more than 18 months. The minimum sentence for a person sentenced under this paragraph may not be suspended.

(g) For purposes of a conviction premised upon subsection (a) of this section, or any proceeding pursuant to this Code in which an issue is whether a person was driving a vehicle while under the influence, evidence establishing the presence and concentration of alcohol or drugs in the person's blood, breath or urine shall be relevant and admissible. Such evidence may include the results from tests of samples of the person's blood, breath or urine taken within 4 hours after the time of driving or at some later time. In any proceeding, the resulting alcohol or drug concentration reported when a test, as defined in subsection (c)(2) of this section, is performed shall be deemed to be the actual alcohol or drug concentration in the person's blood, breath or urine without regard to any margin of error or tolerance factor inherent in such tests.

- (1) Evidence obtained through a preliminary screening test of a person's breath in order to estimate the alcohol concentration of the person at the scene of a stop or other initial encounter between a law enforcement officer and the person shall be admissible in any proceeding to determine whether probable cause existed to believe that a violation of this Code has occurred. However, such evidence may only be admissible in proceedings for the determination of guilt when evidence or argument by the defendant is admitted or made relating to the alcohol concentration of the person at the time of driving.

Case law provides that the element of driving may be proven beyond a reasonable doubt by circumstantial evidence. *Coxe v. State*, Del. Supr., 281 A.2d 606 (1971); *Lewis v. State*, Del. Supr., 626 A.2d 1350 (1993) Subsections (a) and (b) [of Sec. 4177] must be read together and defendant must “be found, beyond a reasonable doubt, to have operated a vehicle while under the influence of alcohol.” 21 *Del. C.* §4177(a); 11 *Del. C.* §301.

By established case law and by statute, the State is required to prove each element of the instant charges beyond a reasonable doubt. 11 Del. C. § 301. *United States ex rel. Crosby v. Delaware*, 346 F. Supp. 213 (D. Del. 1972). A reasonable doubt is “not meant to be a vague, whimsical or merely possible doubt, but such a doubt as intelligent, reasonable, and impartial persons honestly entertain after a careful examination and conscientious consideration of the evidence.” *State v. Matuschefske*, Del. Super., 215 A.2d 443 (1965). 11 *Del. C.* §301.

The State also has the burden of proof beyond a reasonable doubt that jurisdiction and venue has been proven as elements of the offense. 11 Del. C. § 232. *James v. State*, Del. Supr., 377 A.2d 15 (1977). *Thornton v. State*, Del. Supr., 405 A.2d 126 (1979).

The Court as trier of fact is the sole judge of the credibility of each fact witness.

If the Court finds the evidence presented to be in conflict, it is the Court's duty to reconcile these conflicts, if reasonably possible, so as to make one harmonious story of it all.

If the Court cannot do this, the Court must give credit to that portion of the testimony which, in the Court's judgment, is most worthy of credit and disregard any portion of the testimony which in the Court's judgment is unworthy of credit.

In doing so, the Court takes into consideration the demeanor of the witness, their apparent fairness in giving their testimony, their opportunities in hearing and knowing the facts about which they testified, and any bias or interest that they may have concerning the nature of the case.

Opinion and Order

After a careful review of the record and the burden of proof, the Court finds that the State has proven that the defendant had violated Count II of Parking in a Handicap Space in violation of 21 *Del.C.* §4183, 11 *Del.C.* §301, *State v. Matushefske*, 215 A.2d 433 (Del.1965).

Second, applying the standard set forth in *State v. Bennefield*, 2006 WL 258306 (Del.Super.) in order to prove the underlying charge of 21 *Del.C.* §4177(a), according to the Supreme Court ...”[t]he evidence proffered must show that the person has consumed a sufficient amount of alcohol to cause the driver to be less able to exercise judgment and control that a reasonably careful person in full possession of his or faculties would exercise under like circumstances.”⁴ *Id.* The Court notes that the instant case is an impairment case because the State did not introduce the results of the Intoxilizer 500 BAC reading or a phlebotomist blood drawn kit result. Hence, no reading of the defendant’s BAC is available in the trial record.

The Supreme Court has also held that, “It is unnecessary that the defendant be ‘drunk’ or ‘intoxicated’ to be found guilty of driving under the influence.”⁵

The Supreme Court has also held that, “Nor is it required that impaired ability to drive be demonstrated by particular acts of unsafe driving.”⁶ “What is required is that the person’s ability to drive safely was impaired by alcohol.”⁷

In this particular case, Trooper Walther testified that the defendant “smelled of alcohol”, admitted to consuming alcohol at a local bar establishment next to her parked vehicle, her eyes were “bloodshot” and “red”, there was a “strong odor or alcohol beverage.” Trooper Walther also testified she failed the Horizontal Gaze

⁴ *State v. Lewis*, 626 A.2d 1350, at 1355 (Del.1993).

⁵ *See Lewis* at 1355.

⁶ *See Lewis* at 1355.

⁷ *Id.*

Nystagnus Test with all six clues. While Trooper Walther candidly testified the word “confused” was not in his AIIR Report.

Applying the standard in *State v. Lewis*, as set forth above, as well as *State v. Bennefield*, 2006 WL 258306 (Del.Supr.)(Jan. 4, 2006), the Court doesn’t have to make a finding that the defendant was “drunk”. However, the Court must find the standard set forth above is proven for the underlying charge beyond a reasonable doubt. 21 *Del.C.* §4177(a). On defendant’s side of the evidence, Gast passed two (2) mental acuity tests; the counting and alphabet tests. Gast was not observed driving the motor vehicle except for “backing up” and being parked in a handicapped spot. Gast stopped her motor vehicle “promptly” and produced her license, registration, and insurance card without difficulty. Trooper Walther observed no erratic behavior on behalf of Gast while retrieving those documents or while driving her motor vehicle.

The defendant was not charged with any “moving violations” in Title 21 of the Motor Vehicle Code. Gast exited her motor vehicle and did not have any walking difficulties, nor was she unsteady. Trooper Walther watched Gast walk thirty (30) feet in order to perform the HGN NHTSA Test “without difficulty”. Gast’s father testified he observed no observations that Trooper Walther testified about the smell of alcohol or mumbled or slurred speech on behalf of the defendant. Dr. Gast spoke with the defendant shortly after the arrest and offered contrary evidence in her physical impairment observations.

Because the State didn't, or couldn't offer evidence on the balance of the NHTSA field tests pursuant to *State v. Ministero* (Defendant told Trooper Walther she had bad knees when asked if she had any physical disabilities), the Court never heard any test results on Gast's performance of the Walk and Turn Tests and One Legged Stand NHTSA tests.

The Court must determine in this record whether Gast's alleged violation of 21 *Del.C.* §4177 was proven beyond a reasonable doubt. 11 *Del.C.* §301. This Court finds based upon the Court record that the evidence and credibility in this trial is equally balanced. Hence, this Court finds the defendant **NOT GUILTY** of violating 21 *Del.C.* §4177(a).

The Court shall schedule this matter for sentencing on the violation of 21 *Del.C.* §4183 at the earliest convenience of Court and counsel of record.

IT IS SO ORDERED this 23rd day of August, 2011.

John K. Welch
Judge

/jb

cc: Ms. Diane Healy, Case Processor
CCP, Criminal Division